

**A Tindak Murni Sdn Bhd v Juang Setia Sdn Bhd and another
appeal**

B FEDERAL COURT (PUTRAJAYA) — CIVIL APPLICATION
NOS 03–2–11 OF 2018 (B) AND 02(i)-104–11 OF 2018 (B)
TENGKU MAIMUN CHIEF JUSTICE, AZAHAR MOHAMED CJ
(MALAYA), NALLINI PATHMANATHAN, VERNON ONG AND
ABDUL RAHMAN SEBLI FCJJ
C 17 FEBRUARY 2020

D *Arbitration — Arbitration clause — Existence of — Construction contract between employer and contractor contained clause requiring all disputes between parties to be arbitrated — In breach of clause contractor sued and obtained judgment in default ('JID') against employer in High Court for amounts due under interim certificates — Whether Court of Appeal ('COA') wrongly reversed High Court's decision to set aside JID and allow stay of proceedings pending arbitration — Whether where parties had agreed to arbitrate their disputes court should not intervene but allow arbitration to proceed in compliance with ss 8 and 10 of the Arbitration Act 2005 — Whether COA erred in concluding contractor's claim was indisputable and that employer had no defence when it was for arbitrator to determine those matters — Whether COA's decision deprived employer of right to arbitrate its dispute with contractor*

F The appellant and respondent were parties to a construction contract which contained an arbitration clause requiring all disputes or differences between them concerning the contract to be arbitrated. Despite the clause, the respondent sued the appellant in the High Court for amounts due under three interim certificates. On the appellant's failure to enter appearance in the suit, **G** the respondent obtained a judgment in default ('JID'). The appellant applied to set aside the JID on the ground it had a valid defence to the claim, namely, that the respondent's work was defective. On finding that the appellant had shown a defence on the merits, the registrar of the court set aside the JID. Following the setting aside, the appellant, instead of filing a defence, applied **H** to stay the court proceedings pending arbitration of its disputes with the respondent. The stay application, together with the respondent's appeal against the registrar's decision came before the judge in chambers who affirmed the registrar's decision and allowed the stay pending arbitration. On the respondent's appeal, the Court of Appeal ('COA') reversed both those **I** decisions. In its judgment, the COA never addressed the stay application or the issue of arbitration and focused entirely on the JID which, it held, was valid on the ground the amounts claimed under the interim certificates were conclusive and indisputable. The instant appeals against the COA's decision were allowed on two questions of law: (a) was a JID sustainable when the party that obtained

it was bound by a valid arbitration agreement/clause and the opposing party had raised disputes to be ventilated via arbitration? and (b) if a valid arbitration agreement/clause was binding on both parties, should the court hearing an application to set aside the JID consider the 'merits' or 'the existence of disputes' raised by the opposing party? At the hearing of the instant appeals, the appellant submitted, inter alia, that the COA's decision was bad for: (i) being contrary to ss 8 and 10 of the Arbitration Act 2005; (ii) not holding that a valid arbitration clause in the contract coupled with the existence of disputes shown by the appellant constituted a valid defence to the JID; (iii) not appreciating the fact that the appellant had never acquiesced to the court proceedings; (iv) failing to consider that the respondent had breached the arbitration clause by filing the court action; and (v) subordinating the arbitration clause to the JID and depriving the appellant of its right to resort to arbitration.

Held, unanimously allowing both appeals, answering both leave questions in the negative, setting aside the COA's decision and reinstating the High Court's decision:

- (1) The COA erred in failing to consider the nature of the two appeals before it. It had simply determined the appeal relating to the setting aside of the JID in vacuo and disregarded the second appeal relating to the stay pending arbitration although the matters in the two appeals were inextricably intertwined. The COA had let the result of the first appeal determine the second one. The appeal concerning the stay was never considered on its merits and there was a failure to adjudicate. This approach was flawed. The COA ought to have ascertained the nature of each of the appeals and taken into consideration that one of them concerned an application under s 10 of the Arbitration Act 2005 ('the AA') and it should have dealt with that one first. The COA missed an essential jurisdictional issue, namely, whether the dispute ought to be dealt with by way of litigation or arbitration (see paras 48(d), 72(a) & (c)).
- (2) Even if the appeal concerning the JID was heard first, the COA should have considered that the agreement to arbitrate in cl 34 of the contract coupled with s 10 of the AA amounted to a defence on the merits. Accordingly, the JID should have been set aside and the matter referred to arbitration as required by s 10 of the AA unless the court found that the requirements of s 10 had not been satisfied (see paras 49 & 72(b)).
- (3) The COA erred in concluding that no defence on the merits had been shown for the JID to be set aside as the amount claimed by the respondent was indisputable. If it had considered cl 30.3(ii) of the contract, the COA would have realised that the appellant was entitled to raise allegations of defective works in response to the respondent's claim and have such disputes referred to arbitration (see para 72(e)).

- A (4) The respondent's contention that its claim was undisputable and hence there was no dispute that warranted referral to arbitration was flawed because: (a) under the amended s 10 (which came into force on 1 July 2011) of the AA, the court when considering an application for stay pending arbitration was not required to investigate whether a dispute existed between the parties warranting referral to arbitration; and (b) the respondent's reliance merely on cl 30.2 and 30.3(i) of the contract to say its claim was indisputable was erroneous because cl 30.3(ii) clearly entitled the appellant to refer any disputes or differences in relation to set offs or counterclaims or any allegations of defective works or for any other reason whatsoever to an arbitrator under cl 34 (see paras 52–53).
- B
- C (5) Notwithstanding the entry of the JID in the instant case, s 10 of the AA remained applicable and the court was bound to consider whether the requirements of s 10 had been fulfilled so as to refer the matter to arbitration. The JID was not a bar to the matter going for arbitration because the JID was caused by the respondent breaching the agreement to arbitrate. That breach was never accepted by the appellant; hence the agreement to arbitrate remained valid and subsisting. If the respondent's resort to litigation in breach of the arbitration agreement was condoned, it would effectively render an agreement to arbitrate nugatory (see para 48).
- D
- E (6) Neither s 34 of the contract nor s 10 of the AA had the effect of 'subordinating' the JID. This was because the parties had chosen and agreed to arbitration as the sole and exclusive mode of resolution of their disputes/differences and the breach of that agreement by the respondent and its obtaining of the JID could not amount to a subordination of the JID by the arbitration clause (see para 70).
- F

[Bahasa Malaysia summary]

- G Perayu dan responden merupakan pihak-pihak kepada kontrak pembinaan yang mengandungi klausa timbang tara yang menghendaki semua pertikaian atau perselisihan antara mereka berkaitan kontrak itu ditimbangtarakan. Walaupun klausa itu, responden telah menyaman perayu di Mahkamah Tinggi untuk jumlah yang perlu diayar di bawah tiga perakuan sementara. Atas kegagalan perayu untuk memasukkan kehadiran dalam saman itu, responden telah memperoleh penghakiman ingkar ('PI'). Perayu telah memohon untuk menyetepikan PI atas alasan ia mempunyai pembelaan sah untuk menuntut, iaitu, bahawa kerja responden adalah cacat. Setelah mendapati bahawa perayu telah menunjukkan pembelaan atas merit, pendaftar mahkamah telah menetapkan PI tersebut. Berikutan penepian itu, perayu, tidak memfailkan pembelaan sebaliknya telah memohon penggantungan prosiding mahkamah sementara menunggu selesai timbang tara pertikaianya dengan responden. Permohonan penggantungan itu, bersama dengan rayuan responden terhadap keputusan pendaftar dikemukakan di hadapan hakim dalam kamar yang telah
- H
- I

mengesahkan keputusan pendaftar dan membenarkan penggantungan itu sehingga selesai timbang tara. Atas rayuan responden, Mahkamah Rayuan ('MR') telah mengakas kedua-dua keputusan tersebut. Dalam penghakimannya, MR tidak menangani permohonan penggantungan atau isu timbang tara dan memberi focus keseluruhan kepada PI itu yang mana, ia memutuskan adalah sah atas alasan jumlah yang dituntut di bawah perakuan sementara itu adalah konklusif dan tidak boleh dipertikaikan. Rayuan-rayuan ini terhadap keputusan MR dibenarkan atas dua persoalan undang-undang: (a) adalah PI boleh dikekalkan jika pihak yang memperolehnya terikat dengan perjanjian/klausa timbang tara dan pihak yang membantah telah menimbulkan pertikaian agar diselesaikan melalui timbang tara? dan (b) jika perjanjian/klausa timbang tara sah mengikat kedua-dua pihak, patutkah mahkamah mendengar permohonan untuk mengetepikan PI dengan mengambil kira 'merits; atau 'the existence of disputes' yang ditimbulkan oleh pihak yang membantah? Semasa pericaraan rayuan-rayuan ini perayu telah berhujah, antara lain, bahawa keputusan MR adalah tidak wajar kerana: (i) ia bertentangan dengan ss 8 dan 10 Akta Timbang Tara 2005; (ii) tidak memutuskan bahawa klausa timbang tara yang sah daam kontrak beserta kewujudan pertikaian yang ditunjukkan oleh perayu membentuk pembelaan sah terhadap PI itu; (iii) tidak menghayati fakta bahawa perayu tidak pernah bersetuju dengan prosiding mahkamah; (iv) gagal untuk mempertimbangkan bahawa responden telah melanggar klausa timbang tara dengan memfailkan tindakan mahkamah; dan (v) mensubordinasikan klausa timbang tara kepada PI itu dan menafikan perayu haknya untuk merujuk kepada timbang tara.

Diputuskan, sebulat suara membenarkan kedua-dua rayuan, menjawab kedua-dua persoalan kebenaran secara negative, mengetepikan keputusan MR dan mengembalikan semula keputusan Mahkamah Tinggi:

- (1) MR terkhilaf kerana gagal untuk mempertimbangkan jenis kedua-dua rayuan di hadapannya. Ia hanya menentukan rayuan berdasarkan penepian PI *in vacuo* dan tidak mempedulikan rayuan kedua berkaitan penggantungan sementara menunggu selesai timbang tara meskipun perkara-perkara dalam kedua-dua rayuan saling berkaitan. MR membiarkan keputusan rayuan pertama menentukan keputusan kedua. Rayuan mengenai penggantungan tersebut tidak pernah dipertimbangkan berdasarkan meritnya dan terdapat kegagalan untuk diadili. Pendekatan ini adalah salah. MR sepatutnya telah memastikan jenis setiap rayuan tersebut dan mempertimbangkan bahawa salah satu daripadanya berkaitan permohonan di bawah s 10 Akta Timbang Tara 2005 ('AT') dan ia sepatutnya telah ditangani terlebih dahulu. MR tidak mempertimbangkan isu bidang kuasa yang penting, iaitu, sama ada pertikaian itu patut ditangani dengan cara litigasi atau timbang tara (lihat perenggan 48(d), 72(a) & (c)).
- (2) Walaupun rayuan berkaitan PI didengar dahulu, MR patut

- A** mempertimbangkan bahawa persetujuan untuk menimbang tara dalam klausa 34 kontrak beserta s 10 AT membentuk pembelaan atas merit. Sewajarnya PI itu patut diketepikan dan perkara itu dirujuk kepada timbang tara sebagaimana dikehendaki oleh s 10 AT kecuali jika mahkamah mendapati bahawa keperluan s 10 tidak dipenuhi (lihat perenggan 49 & 72(b)).
- B**
- C** (3) MR terkhilaf kerana memutuskan bahawa tiada pembelaan atas merit ditunjukkan untuk PI diketepikan kerana jumlah yang dituntut oleh responden tidak boleh dipertikaikan. Jika ia mempertimbangkan klausa 30.3(ii) kontrak, MR akan menyedari bahawa perayu berhak untuk menimbulkan dakwaan kerja cacat dalam menjawab tuntutan responden dan merujuk pertikaian tersebut kepada timbang tara (lihat perenggan 72(e)).
- D** (4) Hujah responden bahawa tuntutan mereka tidak boleh dipertikaikan dan justeru tiada pertikaian yang mewajarkan rujukan kepada timbang tara adalah cacat kerana: (a) di bawah s 10 yang dipinda (yang berkuat kuasa pada 1 Julai 2011) AT, mahkamah apabila mempertimbangkan permohonan untuk penggantungan sementara menunggu selesai timbang tara tidak dikehendaki untuk menyiasat sama ada pertikaian wujud antara pihak-pihak bagi mewajarkan rujukan kepada timbang tara; (b) kebergantungan responden hanya pada klausa 30.2 dan 30.3(i) kontrak untuk mengatakan tuntutan mereka tidak boleh dipertikaikan adalah salah kerana klausa 30.3(ii) jelas memberi hak kepada perayu untuk merujuk apa-apa pertikaian atau perselisihan berkaitan penepian atau tuntutan balas atau apa-apa pengatahan kerja cacat atau untuk apa-apa sebab lain sekalipun kepada penimbang tara di bawah klausa 34 (lihat perenggan 52–53).
- E**
- F**
- G** (5) Walau apa pun kemasukan PI dalam kes ini, s 10 AT masih terpakai dan mahkamah terikat untuk mempertimbangkan sama ada keperluan s 10 telahpun dipenuhi setakat ia merujuk perkara kepada timbang tara. PI itu tidak menghalang perkara itu dirujuk kepada timbang tara kerana PI itu disebabkan oleh responden yang melanggar perjanjian untuk menimbang tara. Pelanggaran tersebut tidak diterima oleh perayu; justeru persetujuan untuk menimbang tara kekal sah dan masih wujud.
- H** Jika responden menggunakan jalan keluar dengan cara litigasi untuk pelanggaran perjanjian timbang tara dipersetujui, ia secara efektif menjadikan persetujuan untuk menimbang tara adalah remeh (lihat perenggan 48).
- I** (6) Sama ada s 34 kontrak atau s 10 AT tidak mempunyai kesan ‘subordinating’ PI tersebut. Ini adalah kerana pihak-pihak telah memilih dan bersetuju kepada timbang tara sebagai satu-satunya cara penyelesaian yang eksklusif untuk pertikaian/perselisihan mereka dan pelanggaran persetujuan tersebut oleh responden dan ia memperoleh PI bukan

merupakan subordinasi PI oleh klausa timbang tara (lihat perenggan 70).]

A

Cases referred to

Arthur JS Hall & Co (a firm) v Simons Barratt v Woolf Seddon (a firm) Harris v Scholfield Roberts & Hill (a firm) [2002] 1 AC 615, CA (refd)

B

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Evans v Bartlam [1937] AC 473; [1937] 2 All ER 646; (1937) 53 TLR 689, HL (refd)

C

Giannarelli and others v Wraith and others [1988] 81 ALR 417, HC (refd)

Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd [1994] 1 MLJ 312; [1994] 1 CLJ 328, SC (refd)

Henderson v Foxworth Investments Ltd and another [2014] UKSC 41, SC (refd)

Jaginder Singh & Ors v The Attorney-General [1983] 1 MLJ 71; [1983] CLJ Rep 176, FC (refd)

D

King and another v Hoare (1844) 153 ER 206 (refd)

MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd [2016] 2 MLJ 428, CA (refd)

Saif Ali and another v Sydney Mitchell & Co (a firm) and other appellants [1980] AC 198, HL (refd)

E

TNB Fuel Services Sdn Bhd v China National Coal Group Corp [2013] 4 MLJ 857; [2013] 1 LNS 288, CA (refd)

Tjong Very Sumito and others v Antig Investments Ptd Ltd [2009] 4 SLR 732; [2009] SGCA 41, CA (refd)

F

Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd [2013] 4 All ER 715; [2013] UKSC 46, SC (refd)

Legislation referred to

Arbitration Act 2005 ss 8, 9, 9(1), (2), 10, 10(1)

G

Contracts Act 1950 s 65

Federal Constitution arts 121(3), 123

Appeal from: Civil Appeal Nos B-03(IM)(NCVC)-102–12 of 2017 and B-02(IM)(NCVC)-2542–12 of 2017 (Court of Appeal, Putrajaya)

H

Justin Voon (Cheng Sing Yih with him) (Justin Voon Chooi & Wing) for the appellant.

Chew Chang Min (Liza Chan Sow Keng and Shareen Tan Sze Ying with him) (Liza Chan & Co) for the respondent.

I

A Nallini Pathmanathan FCJ:

INTRODUCTION

- B** [1] When the governing contract between two parties provides for an agreement to arbitrate, should that arbitration agreement be subordinated to a judgment in default obtained in court proceedings, contrary to the terms of the governing contract and effectively rendering the agreement to arbitrate, nugatory?
- C** [2] This was the issue in the two related appeals before us. It necessarily involves a comprehension and application of s 10 of the Arbitration Act 2005.
- D** [3] In the instant case, one of the contracting parties initiated court proceedings, notwithstanding the existence of an arbitration clause. As no appearance was entered by the other party, judgment in default was obtained. When an application to set aside the judgment in default fell to be determined, together with an application for a stay pending arbitration, the issues before the courts below included the following:
- E** (a) whether the arbitration agreement or the proceedings in court obtained despite the agreement to arbitrate took precedence; and
- (b) whether the judgment in default ought to be set aside.
- F** [4] On 19 September 2019 we heard both appeals one after the other in relation to the following questions of law:
- G** (a) can a judgment in default in court be sustained when the plaintiff who obtained the judgment in default is bound by a valid arbitration agreement/clause and the defendant has raised disputes to be ventilated via arbitration pursuant to the arbitration clause? and
- (b) should the court in hearing an application to set aside the judgment in default where a valid arbitration clause is binding on parties consider the
- H** ‘merits’ or ‘existence’ of the disputes raised by the defendant?
- [5] We allowed both appeals, answered both questions in the negative, and restored the decision of the High Court. Below we set out our full reasons for doing so.

I

SALIENT FACTUAL BACKGROUND AND CHRONOLOGY OF COURT PROCEEDINGS LEADING TO THESE APPEALS A

[6] The appellant before us, Tindak Murni Sdn Bhd was the defendant in the High Court at Shah Alam in Civil Suit No BA-22-NCVC-70-02 of 2017 ('the civil suit'). The respondent, Juang Setia Sdn Bhd, was the plaintiff that initiated the civil suit. B

[7] As stated earlier Tindak Murni Sdn Bhd, the employer ('employer') and defendant in the civil suit, entered into a building construction contract with Juang Setia Sdn Bhd, the contractor ('contractor') and plaintiff in the civil suit. C

[8] The building contract is dated 1 June 2015. It related to a project for the construction of the remaining portions of a main access road, earthworks and infrastructure works in relation to 428 condominium units in Dengkil, Selangor. It is a standard form Pertubuhan Akitek Malaysia ('PAM') contract. Disputes arose between the parties resulting in the contractor initiating the civil suit. The suit was initiated notwithstanding the clear and unambiguous provision requiring parties to refer any dispute or difference arising between them in relation to any matter arising in connection with the contract, to arbitration. D
E

SALIENT CLAUSES OF THE BUILDING CONTRACT

[9] *Clause 34* of the contract provides for an agreement to arbitrate in respect of any and all disputes arising between the parties in relation to the contract. F

[10] *Clauses 34.2–34.6* provide for the process of arbitration and the provision of an award, which is binding on the parties. G

[11] *Clause 34.4* stipulates that the arbitrator shall have power to open up, review and revise any, inter alia, certificate and to determine all matters in dispute submitted to him as if no such certificate had been given. H

THE DISPUTE I

[12] Works proceeded under the contract. On 29 January 2016, the architect issued a certificate of practical completion certifying that the works were satisfactorily completed. I

[13] The contractor maintained that the employer failed to make payment of a sum totalling RM1,702,870.37 due to it. The parties entered into negotiations in respect of this dispute, but failed to resolve it. This resulted in

- A** the contractor issuing a ‘notice of determination’ on 29 August 2016. The effect of this notice was to give the employer seven days to remedy the breach of the agreement. There was no response from the employer as a result of which the contractor issued a notice of termination of the contract pursuant to cl 26.1(i) of the contract.
- B**
- [14] The contractor then filed the civil suit. The claim was for the sum alleged to be owing to it under three interim certificates amounting to RM2,684,924.55 being the value of works done.
- C**
- [15] The employer paid the contractor the sum of RM1,143,149.65, maintaining, *inter alia*, that there was a dispute between the parties relating to material defects, warranting a set off or complete defence to the claim.
- D**
- [16] No appearance was filed within the requisite time period allowed, as a consequence of which the contractor obtained a judgment in default against the employer on 1 March 2017.
- E**
- [17] The employer then filed a notice of application dated 10 April 2017 to set aside the judgment in default. The bases for the application were that:
- (a) the employer had valid disputes against the contractor’s claims; and
 - (b) the existence of the arbitration clause.
- F**
- [18] The application to set aside the judgment in default was first heard before the Registrar of the High Court who determined that there was a defence on the merits in that there were disputes and/or triable issues justifying the matter being heard on its merits. Accordingly the judgment in default was set aside on 31 July 2012.
- G**
- [19] The employer as defendant did not file a defence as this would constitute a ‘step in the proceedings’ precluding the referral of the matter to arbitration. An application for a stay pending arbitration instead was filed on 10 August 2017. The objective was to stay the court proceedings pending arbitration premised on the arbitration clause.
- H**
- [20] The contractor appealed to the judge in chambers against the decision of the registrar. The judge heard both:
- I**
- (a) the appeal against the order setting aside the judgment in default; and
 - (b) the application for a stay pending arbitration.
- [21] The judge:

- (a) dismissed the appeal against the setting aside of the judgment in default; and A
- (b) allowed the employer's application for a stay pending arbitration on 14 November 2017.

[22] In so determining the High Court judge found, inter alia, that: B

- (a) there was a defence on the merits as there were issues or disputes of fact that required resolution at trial, in relation to the employer's contention that there were defects in the work undertaken which precluded recovery of the sum claimed by the contractor; and C
- (b) there was a valid arbitration clause that parties had agreed to be bound by. Applying s 10 of the Arbitration Act 2005, the judge found that there was nothing to show that the arbitration agreement between the parties was null and void, inapplicable, or inoperative. The court proceedings were therefore stayed pending referral of the dispute to arbitration. D

[23] The contractor then filed two appeals to the Court of Appeal against the decision of the High Court, one in respect of the judge upholding the registrar's decision to set aside the judgment in default and the other against the grant of the stay pending arbitration. On 3 May 2018 the Court of Appeal: E

- (a) allowed the contractor's appeal, reversed the decision of the High Court to set aside the judgment in default, effectively granting judgment to the contractor on the grounds that there was no defence on the merits; and F
- (b) allowed the contractor's second appeal in relation to the stay pending arbitration, effectively refusing to stay the court proceedings pending arbitration.

[24] In essence the Court of Appeal dealt solely with the setting aside of the judgment in default. Having concluded that the judgment in default was erroneously set aside, it did not consider or address the application for a stay pending arbitration. G

[25] The Court of Appeal dealt with the two applications (ie the setting aside and the stay) separately (as did the High Court), as if the two had no nexus whatsoever with the other. In dealing with the application to set aside the judgment in default the Court of Appeal undertook an extensive study of and provided a treatise on the law relating to certificates of payment. H

[26] From paras 31–57 of its judgment, it focussed solely and intricately on this area of the law, citing a multitude of cases to support the contention that certificates of payment are final in nature. I

A [27] Nowhere is there any mention of the arbitration clause nor the law relating to arbitration. The Court of Appeal determined that the certificates of payment in dispute were in fact, conclusive. It thereby effectively dismissed outright any possibility of defects in the work done. It then determined that there were no merits in the defence, and that the High Court had erred in setting the judgment in default aside. The Court of Appeal then allowed the contractor's appeal, restoring the judgment in default. The application for a stay pending arbitration was simply not addressed at all.

C [28] The Court of Appeal approached the appeals by starting with the appeal relating to the setting aside of the judgment in default. Only after that was the stay appeal considered. In view of the fact that they had decided that the judgment in default was to be restored, the only possible conclusion that they could come to was that the stay be dismissed. It was entirely untenable for them to conclude that the stay ought to be allowed in the face of their finding that the judgment in default was regular. It was their manner of approaching the two appeals that led to this result. We were of the view that the approach adopted by the Court of Appeal was flawed, as we analyse further below.

E ANALYSIS OF THE SUBMISSIONS BEFORE THE FEDERAL COURT

The approach to be adopted by the courts in dealing with the two appeals

F [29] What approach is to be undertaken by a court faced with two applications of this nature? Should the appeals have been considered sequentially but in isolation without any consideration whatsoever of the other? Or should the appeals have been heard together such that the issues arising in both applications were available for the court to consider and then determine which of the two should be accorded priority?

G [30] In other words, enabling the court to consider, in light of the express provisions of s 10 of the Arbitration Act 2005 and the express provisions of the governing contract between the parties, whether the judgment in default ought to be subordinated to the agreement to arbitrate.

H *Submissions for the employer prosecuting the appeals*

I [31] Counsel for the employer (the appellant) submitted that the Court of Appeal had erred in failing entirely to consider the arbitration clause and its effects, particularly in light of s 10 of the Arbitration Act 2005. It had instead erroneously proceeded to deal solely with the 'merits' of the 'dispute', concluding that there was no defence on the merits.

[32] The Court of Appeal ought, it was contended, to have considered that a valid arbitration clause together with the disputes raised by the employer comprised a valid defence to the judgment in default of appearance. The employer was prejudiced irrevocably by the court's failure to acknowledge or recognise its legal and contractual rights to have the dispute arbitrated. The employer had never acquiesced to the court proceedings and to that end had not taken 'any step in the proceedings'.

A

B

[33] With respect to s 10 of the Arbitration Act 2005 and general law, it was submitted that it was neither the intention nor purpose of the law that a judgment in default should supersede or override an agreement to arbitrate as contained in the arbitration clause.

C

[34] The contractor had breached the agreement to arbitrate by filing the civil suit when there had been neither waiver nor concession of the agreement to arbitrate. No prejudice would be occasioned to the contractor by the setting aside of the judgment in default and staying the matter pending arbitration, as the dispute would then be dealt with on its merits as parties had originally agreed. By reason of the decision of the Court of Appeal, the employer had effectively been shut out or deprived of its rights to have the matter determined by arbitration.

D

E

[35] When the appeals came up for disposal before the High Court, the judgment in default had already been set aside. Neither had the employer taken any step in the proceedings. Pursuant to s 10 of the Arbitration Act 2005 the stay pending arbitration granted by the High Court ought to have been upheld by the Court of Appeal. This is more so in light of s 8 of the Arbitration Act 2005 which prescribes a statutory non-interventionist approach by the courts, as well as the principles of party autonomy which underscore the law relating to arbitration.

F

G

Submissions for the contractor defending the appeals

[36] Counsel for the contractor submitted that the appeal on the default judgment had to be determined first as there would be no need for the court to consider the appeal on the stay if the default judgment is maintained. His reasons for this were, inter alia, that:

H

- (a) a reading of cll 30.2 and 30.3(i) warranted the conclusion that payments certified under the interim certificate payments were immediately due and payable and not subject to deductions or set offs for defective works or otherwise. To this end, it was contended, these payments were 'carved out' of the mandatory requirement to arbitrate;
- (b) a judgment of the High Court has constitutional force and recognition

I

- A under art 121(3) of the Federal Constitution. It stipulates that a judgment of the courts or a judge has full force and effect according to its tenor throughout the Federation and may be executed or enforced accordingly;
- B (c) the doctrine of merger prevents an arbitration clause from severing a judgment because the cause of action has merged in the judgment and the judgment acquires a higher status per Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] 4 All ER 715; [2013] UKSC 46;
- C (d) res judicata prevents the arbitration clause from severing the judgment per Supreme Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 where Peh Swee Chin SCJ explained the two kinds of estoppel, namely issue estoppel and cause of action estoppel. Reliance was placed on the latter; and
- D (e) it was also submitted that any subordination of a judgment of the High Court had to be specifically and deliberately legislated.

E *The analysis and reasons for our decision*

[37] The starting point for an analysis of the issues in these appeals requires firstly a consideration of the arbitration clause in the governing contract so as to ascertain whether it comprises a valid agreement to arbitrate.

F [38] The question arises why this should be an initial or primary consideration. The reason is s 10 of the Arbitration Act 2005, which sets out the role of the court when confronted with an application for a stay pending arbitration. It reads as follows:

G *A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.* (Emphasis added.)

H [39] The emphasised portions make it clear that the first step is to ascertain whether there is in fact an agreement to arbitrate in respect of the dispute in question (see, inter alia, *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857; [2013] 1 LNS 288).

I [40] Section 9 of the Arbitration Act 2005 is relevant here. It is entitled 'Definition and form of arbitration agreement'. Subsection 9(1) defines an 'arbitration agreement' to mean 'an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between

them in respect of a defined legal relationship, whether contractual or not'. A

[41] The same section goes on to state in sub-s 9(2) that an arbitration agreement may be in the form of an arbitration clause in an agreement, or in the form of a separate agreement. The former situation is applicable to the present facts. B

[42] In the instant appeals, the building construction contract (as we stated earlier) is based on the PAM Form of Contract. The contract contains the following arbitration clause, which fulfils the requirements of sub-s 9(2) of the Arbitration Act 2005. The agreement to arbitrate is contained *in cl 34* of the governing contract. It reads: C

34.0 Arbitration

34.1 *In the event that any dispute or difference arises between the Employer, or the Architect on his behalf, and the Contractor, either during the progress or after completion or abandonment of the Works regarding:* D

34.1(i) *any matter or thing of whatsoever nature arising thereunder or in connection therewith*, including any matter or thing left by this Contract to the discretion of the Architect; or E

34.1(ii) the withholding by the Architect of any certificate to which the Contractor may claim to be entitled to; or

34.1(iii) *the measure and valuation in sub-clause 30.5(i); or*

34.1(iv) the rights and liabilities of the parties under Clauses 25.0, 26.0, 31.0 or 32.0 or F

34.1(v) the unreasonable withholding of consent or agreement by the Employer or the Architect on his behalf or by the Contractor *then such disputes or differences shall be referred to arbitration.* (Emphasis added.) G

[43] Applying ss 9(1) and (2) of the Arbitration Act 2005, it follows that cl 34 of the governing contract comprises an arbitration agreement.

[44] It is evident from the foregoing that any dispute or difference arising in respect of any matter arising under the governing contract is to be referred to arbitration. Clause 34 effectively provides that arbitration is the exclusive dispute resolution choice of the parties. H

[45] The clause read in its entirety warrants the construction that a dispute relating to a claim for monies certified, countered by a defence or set off of defective works, 'shall' be referred to arbitration. The use of the word 'shall' I

- A underscores the mandatory nature of the agreement between the parties. The fact that the dispute falls within the scope of the arbitration clause further fortifies this conclusion.
- B [46] It therefore follows that unless the arbitration agreement in cl 34 is null, void, inoperable or incapable of being performed, all disputes arising under the governing contract are to be referred to arbitration.
- C [47] *In the instant appeals the more pressing question might well be whether the position is any different where one of the contracting parties, the contractor here, had obtained judgment in default in court proceedings, notwithstanding the arbitration clause.*
- D [48] The plain answer can only be that it makes no difference whatsoever. There are several reasons for this.
- E (a) firstly, s 10 stipulates that the court can act only as stipulated under the section. When analysed s 10 only allows consideration of the following matters:
- F (i) that there subsists an agreement to arbitrate;
- G (ii) that no step has been taken in court proceedings (which is not in issue here);
- H (iii) that the arbitration agreement is not null, void, inoperative or incapable of being performed.
- I Therefore from the statutory perspective, even when a judgment in default has been procured, s 10 remains applicable. This in turn means that the court is bound to consider the matters set out in (a), (b) and (c) *notwithstanding the judgment in default*. This is particularly so when there are active efforts being made to set aside the judgment in default of appearance such that the matters in dispute can be ventilated fully by way of arbitration;
- (b) the second reason why the judgment in default cannot or ought not to act as a bar to arbitration is that the contractor, by initiating court proceedings, has effectively breached the arbitration agreement. The commencement of court proceedings or litigation amounts to a breach of the arbitration agreement as contained in cl 34.
- The breach of the arbitration agreement however remains just that, namely a breach or even a repudiatory breach, but unless and until such a breach is accepted by the innocent party, namely the employer, the contract remains valid and subsisting (see s 65 of the Contracts Act 1950).
- In the instant case the ‘innocent party’ namely the employer has, by conduct clearly evinced an intention to be bound by the contract,

namely to have the dispute referred to arbitration. This is evident from the application to set aside the judgment in default followed by the application for a stay of proceedings. As such, the contractor cannot then rely on its own breach to seek to impugn or subordinate the agreement to arbitrate. Neither does the agreement to arbitrate stand voided or inoperative or incapable of being performed;

- (c) thirdly, if the commencement of litigation by the contractor in breach of the agreement to arbitrate in cl 34 is condoned, it would effectively render that agreement nugatory. It would be open to parties to an agreement to stipulate at the outset that the sole and exclusive mode of dispute resolution is arbitration and then renege on the same, in the event of a dispute, with impunity. The intention of the parties at the point in time when the contract was concluded would be effectively undermined; and

- (d) fourthly, the employer's application to stay the court proceedings pending arbitration raised a jurisdictional point which the court was bound to consider. This could only have been done if the Court of Appeal had considered the form and substance of the appeals in totality and appreciated the significance of both applications. While both applications were indeed separate, ie the setting aside of the judgment in default and the stay pending arbitration, it is crystal clear that the two applications (and thus appeals) were inextricably intertwined. It was incumbent upon the Court of Appeal to consider the effect of hearing the first appeal relating to the setting aside in vacuo, as it were, without even mentioning or addressing the stay pending proceedings. That effect was to ignore the existence of an arbitration agreement and to exclude the application s 10 of the Arbitration Act 2005. The Court of Appeal missed an essential jurisdictional issue, namely whether the dispute ought to be dealt with by way of litigation or arbitration.

This was a relevant consideration even when determining the appeal relating to the setting aside of the judgment in default because the fact of the subsistence of the arbitration agreement, a jurisdictional issue, amounted to a matter warranting further investigation. In other words it afforded a defence on the merits (see *Evans v Bartlam* [1937] AC 473; [1937] 2 All ER 646; (1937) 53 TLR 689 and *Hasil Bumi Perumahan Sdn Bhd & Ors v United Malayan Banking Corp Bhd* [1994] 1 MLJ 312; [1994] 1 CLJ 328).

- [49] In all these circumstances it therefore remained incumbent upon the court, notwithstanding the initiation of the civil suit by the contractor, to carry out its function as set out in s 10, namely to refer the dispute to arbitration unless the arbitration agreement is null, void or inoperative. The court carries out its prescribed statutory duty by ascertaining:

- A (a) whether there is an agreement to arbitrate the dispute;
(b) whether the arbitration agreement is valid or null, void or inoperative.

Having done so, the following consequences ensue from s 10:

- B (i) if there is a valid agreement to arbitrate then the court must refer the dispute to arbitration; and
(ii) if the agreement to arbitrate is null, void or inoperative then the matter/suit need not be referred to arbitration.

- C [50] The failure of the Court of Appeal to even cite or consider these issues amounts to a fatal flaw, warranting the intervention of this court.

- D *Is the agreement to arbitrate null, void or inoperative or incapable of being performed?*

- E [51] Counsel for the contractor did not submit that the arbitration agreement was null, void or inoperative. As stated earlier the thrust of the argument was simply that a judgment of the court, albeit a judgment in default, could not be subordinated to an arbitration agreement such as that contained in cl 34.

The contractor's submission that there was no dispute that warranted referral to arbitration

- F [52] It was also emphasised by counsel for the contractor in the course of the oral hearing before us that the relevant clauses of the governing contract and case-law relating to interim certification was such that its claim was beyond dispute. In other words, the existence of a debt due and owing to the contractor was undisputed. As such the contention was that there was simply *no dispute* that warranted referral to arbitration.

- G [53] With respect this contention is flawed and affords no answer to the employer's application to have the dispute referred to arbitration for the following reasons:

- H (a) under s 10 of the Arbitration Act 2005 as it presently stands, there is no question of the court entering into the arena of whether or not a 'dispute' subsists between the parties. The role of the court is simply as set out in s 10, which we have explained in extenso above.

- I This is borne out, inter alia, by the decision of the Court of Appeal, as comprehensively explained by Anantham Kasinather JCA in *TNB Fuel Services Sdn Bhd v China National Coal Group Corp* [2013] 4 MLJ 857; [2013] 1 LNS 288. His Lordship compared the present version of s 10(1) of the Arbitration

Act 2005 with the earlier version of the section and stated:

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24. The present form of s 10 of the Arbitration Act 2005 is the result of the amendment to that section which came into force on 1st July 2011 (Act A1395). *It is generally accepted that the effect of the amendment is to render a stay mandatory unless the agreement is null and void or impossible of performance. The Court is no longer required to delve into the facts of the dispute when considering an application for stay ...* (Emphasis added.)

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The position stated above is therefore trite, namely that the court is not to enquire or investigate whether there subsists a dispute warranting referral to arbitration. That is a matter for the consideration and determination of the arbitral tribunal.

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Prior to the amendment to s 10 the courts expended considerable time and effort in determining whether a 'dispute' subsisted by virtue of the earlier wording of s 10:

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(1) The court before which proceedings brought in respect of a matter which is the subject matter of an Arbitration Agreement shall, where party makes an application before taking any other step in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds:

- (a) that the agreement is null and void, inoperative or incapable of being performed; or
- (b) *that there is in fact no dispute between the parties with regard to the matters to be referred.* (Emphasis added.)

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(See for example *Tjong Very Sumito and others v Antig Investments Ptd Ltd* [2009] 4 SLR 732; [2009] SGCA 41 which stated that 'if it was at least arguable that the matter is the subject of the arbitration agreement, then a stay of proceedings should be ordered ... it is only in the clearest of cases that the Court ought to make a ruling on the inapplicability of an arbitration agreement'. This resulted in the courts undertaking an exercise of determining whether a dispute existed between the contracting parties).

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With the removal of limb (b) however, the issue of the subsistence or otherwise of a dispute between the parties is rendered obsolete and irrelevant

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In the textbook entitled *UNCITRAL Model Law & Arbitration Rules — The Arbitration Act 2005 (Amended 2011 & 2018) and the AIAC Arbitration Rules 2018* by Datuk Professor Sundra Rajoo (special contributor Dr Thomas R Klotzel) (published by Sweet & Maxwell in 2019), the author discussed the effect of amending s 10 of the Arbitration Act 2005 (at pp 30–31):

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1.161 The amendment to section 10 removes the courts' power to stay arbitration proceedings where the court is satisfied that there is no dispute between the parties with regard to the matters to be referred to arbitration. The old provision placed an

A undue restriction on the arbitration process which was not contained in the UNCITRAL Model Law or the New York Convention.

B 1.162 In line with Article 8A of the UNCITRAL Model Law, under the current section 10 of the AA 2005 the High Court is under the obligation to refer the parties to arbitration unless the High Court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed ...

The merits of the contractor's contention that no dispute subsists between the parties

C (b) The second reason why a stay is justified is that there is in point of fact a dispute subsisting between the parties. We are constrained to deal with this issue, notwithstanding our explanation of the law above, as it comprised a substantive part of the contractor's response, in defending the appeals.

D The contractor did not submit that cl 34 is invalid, nor that it does not constitute a valid arbitration agreement. It instead attempted to convince the court to accept that this contractual provision does not oblige all disputes to go for arbitration. This in turn is because when cl 34 is read together with cll 30.2 and 30.3(i), the court is to infer that interim certificates are 'carved out' or 'removed' from the scope of the arbitration clause.

Clause 30.2 of the governing contract mandates payment of certified sums and specifies how such certificates are to be procured. It states:

F Issue of Interim Certificates

G During the Period of Interim Certificates stated in the Appendix, the Contractor shall submit details and particulars to the Architect, sufficient for the Architect to consider and ascertain the amount to be stated in an Interim Certificate. Upon receipt of the Contractor's details and particulars, the Architect shall issue an Interim Certificate to the Contractor with a copy to the Employer, and the Contractor shall be entitled to payment thereafter within the Period of Honouring Certificates stated in the Appendix. Provided always that the Architect shall have the discretion to make interim valuations whenever he considers necessary for ascertaining the amount to be stated as due in an Interim Certificate.

H Clause 30.3(i) provides that the employer is not entitled to withhold or deduct any amount certified as due under the certificates by way of set off or counterclaim or allegation of defective works, unless otherwise expressly provided in the contract. It reads:

I No Entitlement to Set-Off by Employer in Respect of Amount Stated in Interim Certificates

Unless otherwise expressly provided in these Conditions, the Employer shall not be entitled to withhold or deduct any amount certified as due under any Architect's

- certificates by reason of any claims to set-off or counterclaims or allegation of defective works, materials or goods or for any other reasons whatsoever which he may purport to excuse him from making payments of the amount stated to be due in an Interim Certificate. A
- For the contractor it was submitted that when cl 34 is read with and in the light of cll 30.2 and 30.3(i), the effect is that disputes on the interim certificates are ‘carved out’ and not subject to arbitration. B
- It was further submitted that the court must consider the contract in its entirety, give effect to every clause and harmonise each clause with the other clauses. C
- However in making this submission, counsel for the contractor failed and neglected to bring the attention of the court to the clause immediately following upon 30.3(i) namely cl 30.3 (ii) which reads as follows: D
- Disputes of Difference in Respect of Right to Set-Off, to Arbitration
- In the event of any disputes or differences as to any rights of the Employer to set off or to any counterclaim or any allegations of defective works, materials or goods or for any other reasons then such disputes or differences shall be referred to an arbitrator for judgment under Clause 34.0. E
- It is clear from this clause that the employer enjoys and is entitled to refer any disputes or differences in relation to set offs or counterclaims or any allegations of defective works or for any other reason whatsoever to an arbitrator under cl 34. F
- What is clearer still is that by referring solely to cll 30.2 and 30.3(i), counsel for the contractor chose, deliberately or otherwise, to submit to the court that disputes relating to defective works giving rise in turn to set offs were effectively NOT to be referred to arbitration as they were carved out. This is patently incorrect given the express provision of cl 30.3(ii). Contrary to what was submitted, it provides that in the event of disputes relating to the employer’s right to set off from the interim certificates by reason of defective works, such disputes were mandatorily required to be referred to arbitration as set out in cl 34. The use of the words ‘*shall be referred to an arbitrator for judgment under Clause 34.0*’ bears this out. G H
- At best, this submission on behalf of the contractor was ‘selective reading’, and at worst concealment of a wholly relevant contractual provision. I

Duty of advocates and solicitors to the court

A [54] These submissions by the contractor serve as an appropriate occasion for this court to reiterate the oft-ignored principle that advocates and solicitors are officers of the court. Their overriding duty is to the court, not their clients. As such they are under a duty to provide honest and complete submissions. Integrity is of the utmost importance in advocacy, whether oral or written.

B [55] It follows sine qua non that suppression, or deliberately presenting a legal position that does not fully disclose the facts or the law, is a grave dereliction of the responsibilities of an advocate and solicitor. They are duty bound not to suppress facts or law which are either against their client's case, or does not support it, because of their overriding duty to the court, and ultimately the administration of justice as a whole.

D [56] On this issue Raja Azlan Shah Ag LP (as His Royal Highness then was) approved of the following passage in *Jaginder Singh & Ors v The Attorney-General* [1983] 1 MLJ 71 at p 72; [1983] CLJ Rep 176 at p 178:

E ... The court can dispense justice only if counsel will not mislead, otherwise justice will suffer from the infirmity of the court itself being devoid of justice. People seldom pause to ask sometimes what safety the ordinary individual has in the hands of the lawyers if the court itself, in which he seeks redress, is no longer safe to be in the same hands.

F (See also the cases cited at paras 8–9 of Lord Clarke of Stone-cum-Ebony's speech to the Malaysian judiciary on 14 September 2011 entitled *Ethics and Civil Procedure* (accessed at http://www.kehakiman.gov.my/sites/default/files/ETHICS%20for%20Malaysian%20Judges%20O%202011_.pdf on 30 September 2019), the English cases of *Saif Ali and another v Sydney Mitchell & Co (a firm) and other appellants* [1980] AC 198 and *Arthur JS Hall & Co (a firm) v Simons Barratt v Woolf Seddon (a firm) Harris v Scholfeld Roberts & Hill (a firm)* [2002] 1 AC 615 at pp 686 and 692 (particularly the judgments of Lord Hoffman and Lord Hope in the latter case) as well as the Australian case of *Giannarelli and others v Wraith and others* [1988] 81 ALR 417 at p 421).

H [57] In the instant appeals it is trite that the governing contract must be read and construed holistically and that the parties are not entitled to pick and choose clauses which are in their favour and ignore clauses which do not support their case.

I [58] In these circumstances the contractor's submission that there was no dispute warranting referral to arbitration pursuant to cl 34 is misguided and has no merit whatsoever. The Court of Appeal therefore erred in determining that there were no merits in the defence, and that the contractor was undisputably entitled to the sum claimed. The affirmation of the judgment in default was therefore flawed.

[59] In its written submissions, the contractor also alleged, inter alia, (as summarised above) that a judgment of the High Court has constitutional force and recognition under art 121(3) of the Federal Constitution. As such it has full force and effect according to its tenor throughout the Federation and may be executed or enforced accordingly. This submission is irrelevant to the issues in this appeal as the validity of a judgment in default in the context of an imminent execution or a winding up action is not the subject matter of these appeals.

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[60] In these latter cases, undoubtedly a judgment in default stands and may be executed upon and enforced. However the issues here relate to the agreement of the parties to arbitrate, and the failure by the contractor to honour that agreement and to initiate court proceedings, in breach of such agreement. When the judgment in default is in issue and is sought to be set aside to allow the arbitration to prevail, as agreed by the parties, what course of action should be adopted by the court? As we have discussed at length, s 10 comes into play. Therefore the reference to art 123 is misplaced and fails to address or provide any form of response to the matters to be adjudicated upon here.

C

D

[61] The other submission that the doctrine of merger prevents an arbitration clause from ‘severing’ a judgment because the cause of action has merged in the judgment and the judgment acquires a higher status (per Lord Sumption in *Virgin Atlantic Airways Ltd v Zodiac Seats UK Ltd* [2013] 4 All ER 715; [2013] UKSC 46) is similarly inapplicable in the instant appeal. A cursory reading of the case discloses that it is a judgment relating to the adjudication of patents which went through a full trial in the English Courts. The appeal in the Supreme Court of the United Kingdom relates primarily to the problems arising from the system of parallel jurisdiction for determining the validity of European patents. Its relationship to the instant appeals is completely obscure.

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[62] A passage mid-way in the judgment of Lord Sumption appears to have been selected and randomly cited. At para 16 of the judgment, the issue in the appeal is set out, namely that an order of the Court of Appeal upholding the validity of the patent and directing an enquiry as to damages may only be varied by way of an appeal. However no further avenues of appeal were open. The issue before the court was whether one of the parties was entitled to contend in the inquiry that there were no damages because the patent had been retrospectively amended so as to remove the claims held to have been infringed. This in turn depended upon whether the Court of Appeal was correct to state that its order declaring the patent to be valid continued to bind the parties per rem judicatum notwithstanding that the patent was later amended on the basis that it was not valid in the relevant aspects.

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- A [63] It is in this context that Lord Sumption made a statement on the doctrine of merger, in relation to *res judicata*. He explained the doctrine of merger as treating a cause of action as extinguished, once a judgment has been given upon it, and the claimant's sole right as being a right upon the judgment. He also stated that this principle is a substantive rule about the legal effect of an
- B English judgment which is regarded as of a higher nature and therefore as superseding the underlying cause of action, premised upon a decision dating back to 1844 (*King and another v Hoare* (1844) 153 ER 206).
- C [64] The nexus to the present appeals is baffling. This is particularly so, as no rational or legal coherence was drawn between the doctrine of merger and an application to set aside a judgment in default coupled with a stay pending arbitration.
- D [65] If it was the intent of counsel to suggest that the cause of action that subsisted was merged in the judgment in default and accordingly the agreement to arbitrate could not survive such a merger, as the plaintiff/contractor's sole right was that on the judgment, then it is a non-starter.
- E [66] These principles were made by Lord Sumption in the context of *res judicata*. *Res judicata* is inapplicable in the present context as the merits of the case have not and were not determined by the contractor simply obtaining a judgment in default, which was sought to be set aside. The fact that the Court of Appeal erroneously upheld the judgment in default and wholly disregarded
- F the agreement to arbitrate, does not afford the contractor the basis to contend in these appeals, (where the Court of Appeal's decision is being challenged) that the agreement to arbitrate stands vitiated by reason of the doctrine of merger ensuing from the principle of *res judicata*.
- G [67] Reverting to the issue of advocacy, written or oral, it bears reiterating that if a passage in a judgment is sought to be relied upon, it is incumbent upon counsel to set out and explain:
- H (a) how the passage cited is applicable to the matter before the court;
- (b) the nature of the case cited;
- (c) the facts of the case, particularly whether and how such facts are relevant, similar or distinguishable from the matter before the court;
- I (d) the context in which the statement relied upon was made;
- (e) whether the statement amounts to the ratio or is obiter or;
- (f) whether the case is being cited for a principle of general application; and
- (g) whether the statement comprises an expansion of an existing principle.

[68] Otherwise such a randomly cited passage is of little or no assistance to a court in adjudicating on a matter. Similarly the contention that *res judicata* prevents the 'arbitration clause from severing the judgment in default' lacks clarity and coherent legal reasoning.

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[69] *Res judicata* as we know and understand it extinguishes a cause of action once a matter has been adjudicated upon its merits. That is not the case here. These appeals relate to a case where judgment was obtained because no appearance was entered. The defects complained of by the employer were never heard nor dealt with notwithstanding the arbitration agreement. The principle or doctrine cannot therefore 'bite'. Put another way it is simply inapplicable to the present factual and legal matrix, particularly when the judgment in default is being actively sought to be set aside. The attempt to stifle the employer from having its case heard by way of arbitration, as agreed between the parties amounts to a breach of the fundamental principles of natural justice.

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[70] Finally the submission for the contractor that any subordination of a judgment of the High Court had to be specifically and deliberately legislated is misplaced as the effect of cl 34 is not to subordinate a judgment in default. Neither does s 10 of the Arbitration Act 2005 have the effect of 'subordinating' a judgment in default. This is because the parties had chosen and agreed to arbitration as the sole and exclusive mode of dispute resolution in respect of any dispute or difference arising from this contract. The breach of this agreement by the contractor and the subsequent obtaining of a judgment in default cannot then be said to amount to a subordination of a judgment by an arbitration clause.

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[71] In point of fact if this form of legal rationale is allowed to persist, as stated earlier, all forms of dispute resolution agreed to between parties in their contracts would be rendered ineffectual and nugatory as it would be open to one party to breach the same and effectively put an end to the agreement to resolve disputes by way of arbitration. The defaulting party would be effectively 'rewarded' for breaching the agreement to arbitrate. This is the very mischief which s 10 seeks to prohibit.

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APPELLATE INTERVENTION

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[72] For the reasons stated above we determined that the Court of Appeal had erred in law in arriving at the decision it did. The Court of Appeal erred in that it:

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- (a) failed to give consideration to the nature of the two appeals before it. It simply determined the appeal relating to the setting aside of the judgment in default in *vacuo*, disregarding the fact that the second appeal related to a stay pending arbitration. This approach was flawed.

- A The Court of Appeal ought to have ascertained the nature of each of the appeals and taken into consideration that one related to a s 10 application, which should therefore have been dealt with first;
- B (b) even if the appeal relating to the judgment in default was heard first, the Court of Appeal should have considered that the existence of an agreement to arbitrate coupled with s 10 of the Arbitration Act 2005 warranted the conclusion that this amounted to a defence on the merits. Accordingly the judgment in default ought to have been set aside and the matter referred to arbitration in accordance with the statutory requirements of s 10;
- C (c) the Court of Appeal erred in that it effectively only considered one of the appeals before it and let the result of that appeal determine the result of the second appeal. In other words the second appeal was never considered on its merits. It amounted to a failure to adjudicate on the second appeal;
- D (d) the Court of Appeal erred in failing to consider or give effect to the relevant provisions of the Arbitration Act in failing to consider the arbitration clause and to give effect to the relevant provisions and purpose of the Arbitration Act 2005. If it had done so it would have concluded that the dispute between the employer and the contractor had to be referred to arbitration in accordance with the agreement encapsulated in cl 34 of the governing contract; and
- E
- F (e) the Court of Appeal erred in its adjudication on the subject matter of the appeal before it relating to the judgment in default in that it erroneously concluded that there was no defence on the merits. If it had read or considered cl 30.3(ii) of the governing contract it would have realised that the employer was entitled to raise allegations of defective works in response to claims by the contractor under the interim certificates and have such dispute/s referred to arbitration.
- G

H [73] We were therefore constrained to intervene, reverse the decision of the Court of Appeal, and reinstate the decision of the High Court. In so doing we reminded ourselves of the confines within which this court, as an appellate court, is bound to exercise its powers. It is only to do so in the face of clear errors of law (see *MMC Oil & Gas Engineering Sdn Bhd v Tan Bock Kwee & Sons Sdn Bhd* [2016] 2 MLJ 428; *Henderson v Foxworth Investments Ltd and another* [2014] UKSC 41).

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[74] Applying the foregoing principles, we concluded that the Court of Appeal had wrongly interfered in the decision of the High Court. The High

Court judge had not erred in law or on the facts in upholding the setting aside of the judgment in default and in allowing the stay of court proceedings pending arbitration.

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[75] We were satisfied that there were clear errors of law in the decision of the Court of Appeal and that it was plainly wrong.

B

ANSWERS TO THE QUESTIONS OF LAW

Question 1: Can a judgment in default in court be sustained when the plaintiff who obtained the judgment in default is bound by a valid arbitration agreement/clause and the defendant has raised disputes to be ventilated via arbitration pursuant to the arbitration clause?

C

ANSWER: WE ANSWER THE QUESTION IN THE NEGATIVE

Question 2: Should the court in hearing an application to set aside the judgment in default where a valid arbitration clause is binding on parties consider the 'merits' or 'existence' of the disputes raised by the defendant?

D

ANSWER: WE ANSWER THE QUESTION IN THE NEGATIVE

By way of conclusion we reiterate our decision handed down on 19 September 2019. Both appeals were allowed with costs of RM20,000 to the appellant, subject to allocatur. The order of the Court of Appeal was set aside and the order of the High Court reinstated.

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Both appeals unanimously allowed, both leave questions answered in the negative; COA's decision set aside and High Court's decision reinstated.

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Reported by Ashok Kumar

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